



Ontario

Office of the Conflict of
Interest Commissioner

ANNUAL REPORT

2007-2008

**Office of the Conflict of
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June 30, 2008

The Honourable Ted McMeekin
Minister of Government and Consumer Services
4th Floor, Suite 4320
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99 Wellesley Street, West
Toronto, Ontario
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Dear Minister:

Re: Office of the Conflict of Interest Commissioner Annual Report

I am pleased to present to you the first annual report of the Office of the Conflict of Interest Commissioner, for the fiscal year 2007-2008.

Yours sincerely,

The Honourable Sidney B. Linden
Commissioner

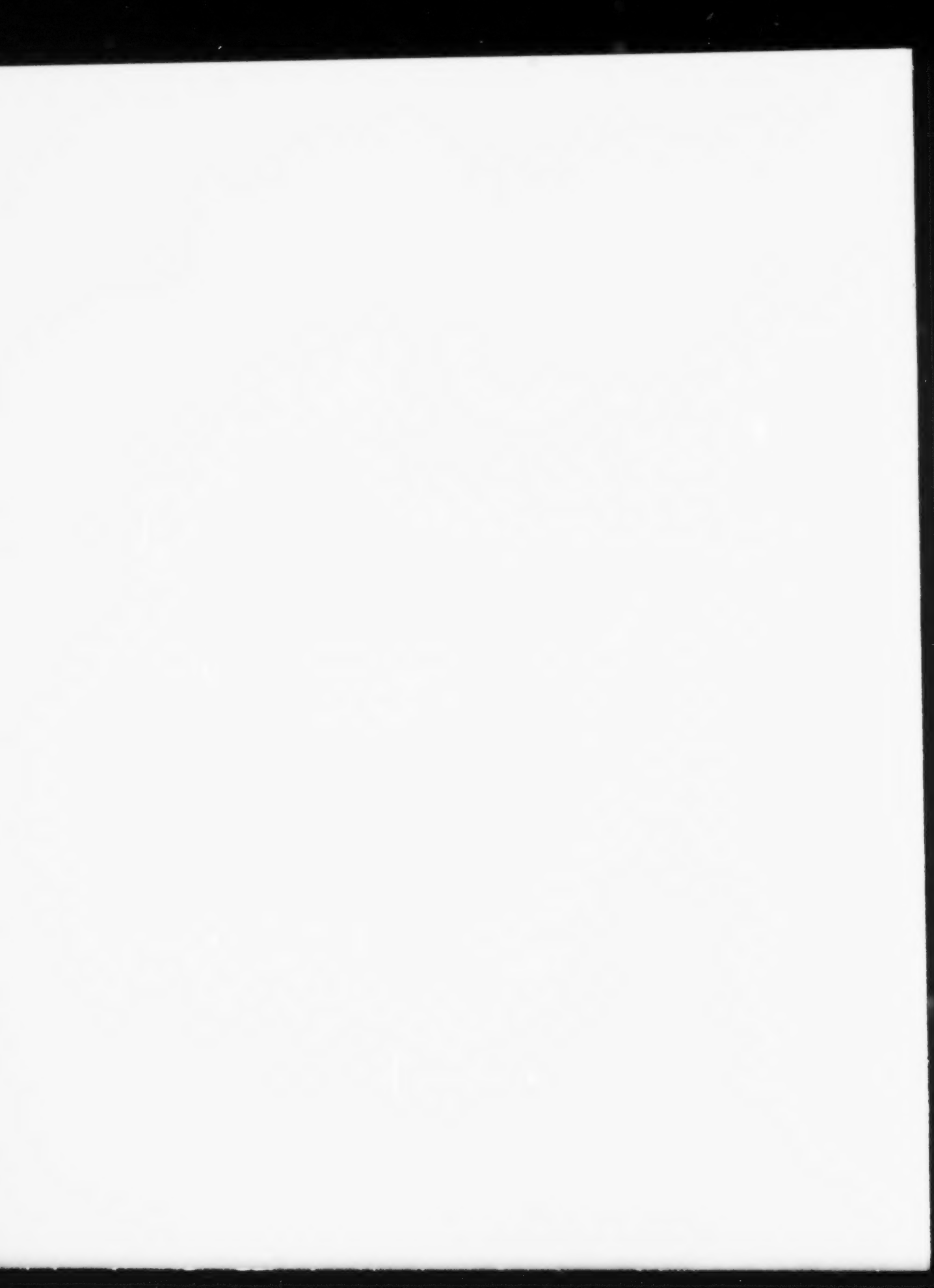
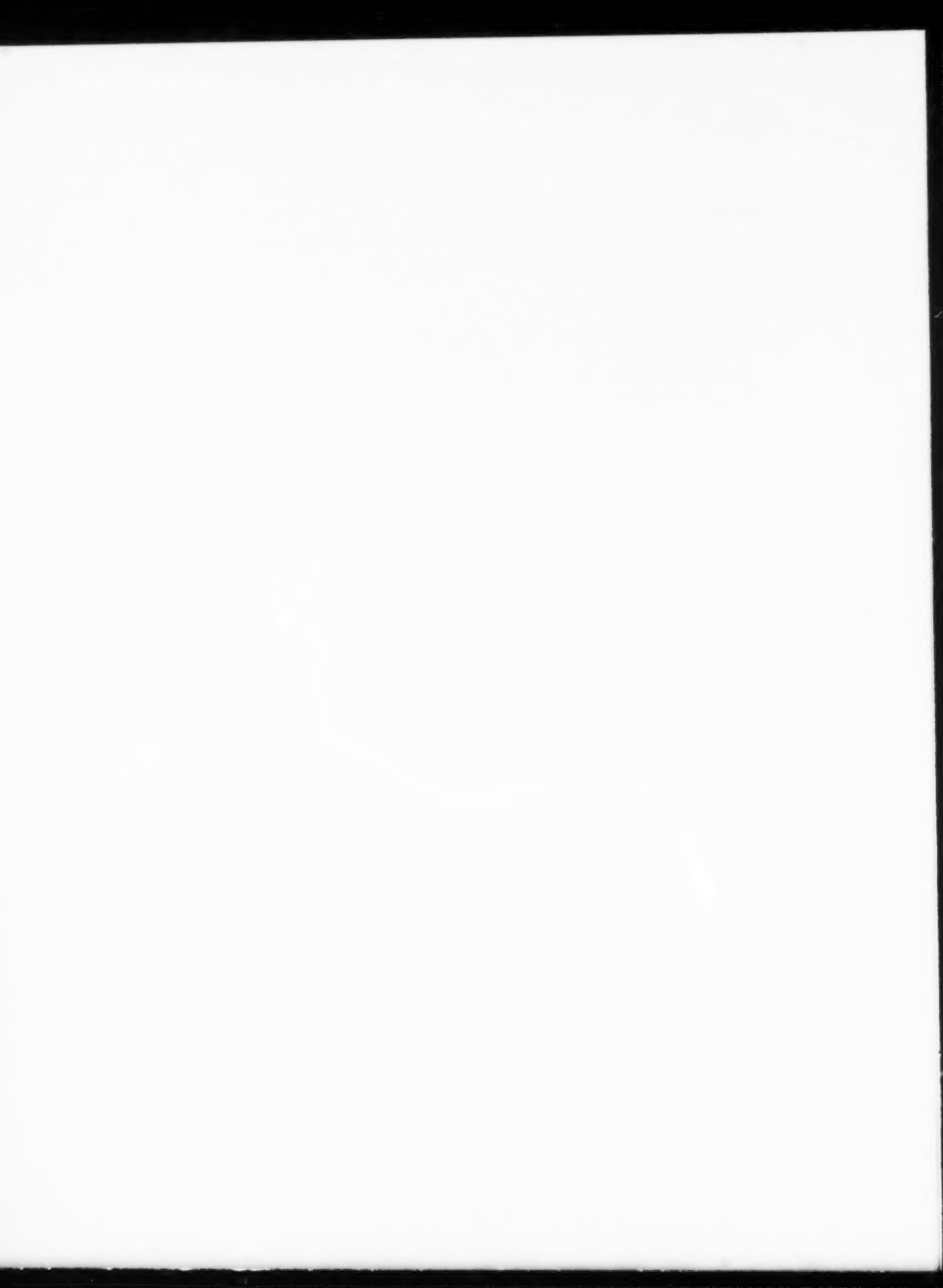


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INTRODUCTION

This is my first report as Ontario's conflict of interest commissioner. Only nine months have passed since my appointment, and setting up the Office of the Conflict of Interest Commissioner is still under way. Certain tasks are always associated with the establishment of a new office, but we are also continuing to develop the procedures and guidelines necessary to breathe life into the specific provisions of the *Public Service of Ontario Act, 2006 (PSOA)* that address conflict of interest.

The effective date of my appointment was July 30, 2007, and our office opened for business on August 20, just three weeks later. We received the first request for advice just eight days thereafter. Interpreting the scope and limits of our mandate, formulating policies, and providing advice, and at the same time making decisions on matters brought to our attention, was challenging. On the other hand, starting our work without a fully developed set of policies and procedures in place helped to inform the development of the mechanisms we needed. On balance, I believe that the timing was beneficial in that it facilitated the process of defining and communicating the function of this office within the framework of Ontario's larger ethical landscape.

This is not the first time that I have been called upon to start up a new agency. As this new office takes shape, I feel increasingly privileged to have this opportunity to contribute to the Ontario government's efforts to strengthen the application of the stated principles of the public service. Ontario's public service has a well-deserved reputation for excellence, and the need to avoid real or potential conflicts of interest is not new to Ontarians who serve in government. However, there is always room for improvement. The new *PSOA* is intended to reinforce the high standard of integrity already in place. It aims to establish or reinforce commonly understood standards and benchmarks and make them applicable to all public servants. I look forward to advancing that objective, and I am pleased to report herein on our progress to date.

The *PSOA* requires that I report annually to the Minister of Government and Consumer Services on the activities of the office during the preceding year. My report is to include an analysis of operational and financial performance¹ and an assessment of whether we achieved our service performance targets. In this year's report, I provide as much of that information as is available. Apart from providing a progress report, I believe that the importance of a report to the minister, at this early stage, is to convey my understanding of the mandate assigned to this office and to signal the ways in which we intend to fulfil it.

For the benefit of members of the public who will read this report, it begins with a brief discussion of the government's legislative intent with respect to conflict of interest, as expressed in the *PSOA*, and my interpretation of the role envisioned for the Office of Conflict of Interest Commissioner in the new environment. Following that is an overview of our main activities to date and our priorities for the coming year.

¹ See Appendix 2.

Conflict of Interest and the *Public Service of Ontario Act, 2006*

On August 20, 2007, the *PSOA* replaced the *Public Service Act* as the legislative framework for ethical and human resources governance in Ontario's public service. As set out in section 1, the purposes of the new act include:

- To ensure that the public service of Ontario is effective in serving the public, the government and the Legislature
- To ensure that Ontario's public service is non-partisan, professional, ethical and competent
- To set out roles and responsibilities in the administration of Ontario's public service
- To provide a framework for the leadership and management of the public service of Ontario
- To set out the rights and duties of public servants concerning ethical conduct and political activity.

Public servants have always been expected to act with integrity. They must be mindful of the public trust placed in them by virtue of their employment at public expense and by virtue of their responsibility to manage public resources. Under the previous *Public Service Act*, the ethical framework governing conflict of interest was a mix of common law, legislative rules and regulations, and government guidelines. To resolve conflict of interest issues, it was often necessary to rely on jurisprudence; in particular, Supreme Court of Canada decisions such as *Osborne v. Canada* (1991) and *Fraser v. Canada* (1995); and on a number of administrative tribunal cases, particularly those of Ontario's Grievance Settlement Board.

Conflict of interest matters were referred to part-time commissioners. Retired justices Lloyd Houlden and Sydney Robins served in that capacity, and the public service was fortunate in having such distinguished and experienced individuals to turn to for assistance. Their mandate was limited to the disposition of specific cases and they ably resolved the matters put before them. Conflict of interest cases were referred to these commissioners on an ad hoc basis, often without clear guidelines on when it was appropriate or required to do so. The new act, among other things, provides for the establishment of a full-time conflict of interest commissioner and office. It contemplates a more clearly defined role for the commissioner, one that is considerably broader and carries additional responsibilities within a revised ethical framework.

In revising the ethical framework for the Ontario public service, the government's intention, specifically with respect to conflict of interest, was to achieve greater consistency in the application of conflict of interest rules throughout the public service. The change is also intended to clarify lines of accountability in applying those rules, and to achieve a higher level of transparency and understanding, within and outside government, with regard to conflict of interest matters and best practices. Creating a permanent Office of the Conflict of Interest Commissioner is a primary

means through which these objectives are to be achieved. The government's legislative intentions necessarily inform the way in which the commissioner must undertake the responsibilities assigned to this new position.

The Role of the Conflict of Interest Commissioner

The *PSOA* assigned the conflict of interest commissioner responsibility for certain conflict of interest and political activity matters. The commissioner's sphere of responsibility is limited to the employees of ministries and public bodies and individuals appointed to public bodies. Ontario's integrity commissioner has similar responsibilities with respect to elected officials and their staff.

The commissioner is responsible for handling requests for advice or rulings from deputy ministers, chairs of public bodies, and other designated individuals on specific conflict of interest matters, for receiving disclosures of financial information from public servants working on matters that involve the private sector, and for approving the conflict of interest rules of public bodies to ensure consistency with Ontario public service standards, as set out in the *PSOA*.

As part of the *PSOA* provisions to reinforce the non-partisan nature of the public service, the commissioner receives requests for advice or for rulings from deputy ministers and chairs of public bodies on specific political activity matters. The commissioner also considers requests from part-time appointees of prescribed public bodies who wish to engage in political activities other than those expressly permitted in the *PSOA*.

ACTIVITIES IN THIS FISCAL YEAR

Articulating the Overarching Elements of the Mandate

With any new institution, it is important to ensure that there is a common understanding of its mandate. This is particularly true for an organization, such as this one, which forms part of a larger framework in which other organizations and individuals have an important role.

Having considered and appreciated the impetus for the new act and for creating this office, and after careful analysis of the legislation, we have defined our role as having five main elements:

1. To provide clarity and guidance to the public service about conflict of interest matters
2. To foster quality and consistency in the application of conflict of interest rules within the public service
3. To assist ethics executives² in meeting their responsibilities for applying and enforcing the conflict of interest rules
4. To act as ethics executive for certain public servants and former public servants
5. To assist government conflict of interest decision-makers in maintaining high standards of ethical conduct in the public service.

Identifying the Specific Core Functions of the Office

Under the *PSOA* and the accompanying regulations, the conflict of interest commissioner has a role as the ethics executive for specified public servants and a leadership role in conflict of interest and political activity matters throughout the Ontario public service. A number of responsibilities go along with these roles, which we have distilled into three core functions:

1. To make determinations, authorizations and approvals on conflict of interest and political activity matters
2. To provide advice on conflict of interest matters
3. To contribute to the education of the public service and the general public about conflict of interest and political activity matters.

Ethics executives are accountable for ethical conduct in their institutions in the first instance. They are the first point of contact for employees and appointees requiring decisions or advice regarding conflict of interest matters. They answer questions about the application of conflict of interest rules, determine whether a conflict of

² "Ethics executive" is a new term. It refers to the individuals within the public service who have a specific role under the *PSOA* to promote ethical conduct within the organization for which they have responsibility.

interest exists, and provide direction where there is a conflict of interest or potential conflict of interest. This approach is consistent with the principles of good governance and accountability.

The intended role of ethics executives has been an important consideration in identifying the conflict of interest commissioner's core functions. The first two functions set out above are to be understood as applying to matters in which ethics executives may require assistance and, of course, to the commissioner's own role as ethics executive for specified public servants.

A further function, approval of the conflict of interest rules of public bodies, is discussed later in this section.

Developing a Governance Framework

Provincially established public bodies are accountable to the government for the way in which they carry out their mandate. Typically, a memorandum of understanding between the agency and its ministry sets out their respective governance roles and responsibilities, thus serving as the agency's governance framework. Each memorandum includes similar minimum provisions, but the details vary to reflect powers, duties or functions of the public body. Settling those details for this office was one of our first priorities.

The ease with which this office and the ministry achieved accord on the substance and language of our memorandum of understanding reflects a shared vision of the role intended for the commissioner. It also reflects a shared vision of the way in which this role is to be fulfilled, having regard for the commissioner's necessary independence of government on the one hand and the requirement for administrative accountability on the other.

Initiating Collaboration with Other "Ethics" Agencies

The Office of the Conflict of Interest Commissioner is now a part of a larger framework for advancing the government's objectives for a non-partisan, ethical and competent public service. There are distinctions and commonalities among the component agencies of that framework, which includes legislative agencies such as the Office of the Ombudsman and the Office of the Integrity Commissioner. Cooperation among these component agencies is important for the optimal functioning of each individual agency and for the individuals and organizations affected by them.

I am pleased to report that our early efforts to explore ways to establish partnerships with the other "ethics" agencies have been well received. This collaboration will serve as a strong foundation for communicating the role of the conflict of interest commissioner, redirecting inquiries that fall outside the jurisdiction of the office, and developing administrative best practices suited to the role and responsibilities envisioned for this office.

Establishing Lines of Communication and Mechanisms for Education

The conflict of interest commissioner's responsibility to contribute to the education of the public service and the general public about conflict of interest and political activity matters is perhaps less readily definable than the responsibility to make determinations or give approvals. Nevertheless, based on my interpretation of the *PSOA*, and on my understanding of the government's objectives in establishing this office, I consider our education responsibility to be a significant aspect of my function, if not one of the most significant.

The legislature placed the conflict of interest commissioner within a larger ethical governance system, yet in a leadership role on conflict of interest and political activity matters. The intent was not to take primary decision-making responsibility away from public servants and their ethics executives. Instead, the commissioner's role is to support and reinforce that primary decision-making power, and only to assume responsibility when necessary or required under the act.

With the passage of the *PSOA*, deputy ministers, chairs of public bodies, the secretary of cabinet, and the conflict of interest commissioner have a more explicitly defined role as ethics executives. Accordingly, it was a high priority for me to meet with them to establish lines of communication and define our respective responsibilities. I am confident that we will work together effectively toward our mutual goals, with each new matter contributing to our collective experience and the education of the public service and the public regarding conflict of interest and political activity matters.

This office will issue periodic bulletins on topics with broad application and memoranda on more specific subjects. We have already begun to do this. For example, under the *PSOA*, new political activity rules for a newly prescribed category of public servant significantly affected a large number of part-time appointees to prescribed tribunals. With the assistance of the Public Appointments Secretariat, we circulated a memo to the public servants involved to highlight the requirements now affecting them.³

My annual reports to the minister will contain illustrative summaries of some of the conflict of interest and political activity matters addressed during the year (nine months, in the case of this first report). These examples (without identifying information) will be a growing source of information to assist public servants and the public in understanding the types of issues arising and our response to them.

Preparing to Review Conflict of Interest Rules for Public Bodies

With the passage of the *PSOA*, the conflict of interest rules applicable to public servants in government ministries will also apply to public servants who are employees and appointees of public bodies. However, the new legislation also allows public bodies to develop their own rules, having regard for their powers, duties and functions.

Public bodies that choose to develop conflict of interest rules are required to submit proposed rules to this office for review and approval. To ensure consistency

³ See Appendix 5.

throughout the public service, approval is to be based on whether the proposed rules establish a degree of ethical conduct equivalent to that established in the conflict of interest rules governing other public servants. The legislators selected the ministry rules as the standard for application throughout the public service because those rules are comprehensive and broad enough to cover most circumstances. I pointed this out to all public bodies in a memorandum circulated in the fall.⁴ These rules are set out in a regulation accompanying the *PSOA*.

The rules governing ministries come into effect as applying to public bodies one year following proclamation of the *PSOA* (August 20, 2008), unless I have approved alternative rules submitted by the public body before that date and the approved rules have been posted on our website. At time of writing, most of the almost 200 public bodies to which this provision applies have chosen to be governed by the rules for ministries. As expected, they have found that these rules are readily applicable to their activities. Nevertheless, a small number of public bodies have sought approval for their own conflict of interest rules.

Setting Out Principles and Values

As an administrative tribunal, this office is part of the overall administrative justice system in Ontario. The public will naturally expect certain principles to be operating in the execution of its functions. However, as a new agency in a position of public trust and responsibility, we believe it is important to formally set out the values that will guide us in carrying out our work:

Rights and interests at stake

The public, the government and the legislature have a right to a non-partisan, ethical, and competent public service. Organizations and individual public servants also have rights, some set out in legislation, including rights related to employment and labour relations and privacy and confidentiality. Our procedures will have to take all of these rights into account, including the individual's right to engage in political activity.

Leadership

This office is charged with articulating and upholding the principles of the *PSOA* and with promoting ethical conduct in the Ontario public service. Our policies must therefore enable us to lead by example as we strive to be a model agency within Ontario's administrative justice system and among similar agencies throughout the world.

Integrity

Our policies and operations must reflect the highest ethical and legal standards.

⁴ See Appendix 4.

Fairness

The *PSOA* and the common law set out fairness principles, and we are committed to adhering to them. This office will carry out its functions in an impartial, lawful, unbiased, and just way.

Independence and accountability

I am responsible for carrying out the functions of my office in a way that is consistent with the purpose, language and spirit of the *PSOA*. As an agency of the Ministry of Government and Consumer Services, this office reports to that minister. As commissioner, I am accountable to the minister and the ministry in all matters except my decision-making function. In that role, I am independent, subject only to the oversight function of the courts.

Transparency

Part of transparency is having policies and procedures that are clear and easy to understand. Anyone who may become involved with our office, as well as the broader government and the public, should be able to understand our role and process.

In certain specified circumstances, when I make a determination on conflict of interest matter, I am required to notify other designated individuals of the outcome. We will be developing approaches to share these findings in order to raise awareness of matters brought to my attention.

Confidentiality

Inevitably, this office will regularly receive confidential information, including information of a personal nature. Regulation 384/07 under the *PSOA* sets out guidelines for the collection, use and disclosure of personal information, but leaves certain aspects of the application of the regulation to my discretion. This office is committed to collecting, using, and disclosing confidential information only to the extent necessary to discharge its functions under the act.

Expertise

To instil public confidence in this office, we have to demonstrate a high level of competence in carrying out our duties. In terms of formulating policy, this principle has already come into play in staffing the office with people who have demonstrated excellence in the required skills. We are all committed to continually advancing and updating our knowledge. We also intend to monitor developments and practices in other jurisdictions to ensure that we are not missing opportunities to improve our own practices.

Consistency

Since one of the purposes of the *PSOA* was to improve consistency in the ethical framework of the public service, the activities of this office have to demonstrate that quality in the application of our policies. We are developing procedures for keeping records of our activities that will provide a body of information about how various types of inquiries, referrals and decisions are handled.

Accessibility

In addition to our commitment to making our process and procedures easy to understand, this office is also committed to making information available in formats that ensure accessibility. As a policy, we will seek to prevent, identify, and remove barriers to access to our services for people with disabilities, in keeping with Ontario government standards.

Timeliness

Ethics executives will need timely responses to referrals and requests for advice. Individuals involved with this office likewise have an interest in obtaining decisions or advice as soon as possible.

To the extent possible, but leaving room for flexibility to investigate sufficiently and respond appropriately, we intend to set out and adhere to service standards for performing our functions.

Courtesy and respect

I see the role of this office as helping the public service in meeting its own commitment to professionalism, integrity, accountability and excellence. In that spirit, everyone who has contact with this office should find that they have been treated with respect, dignity and courtesy.

Cost-Effectiveness

This office operates with public funds. Our expenditure policies will reflect our accountability for the effective and responsible stewardship of those resources.

Putting in Place a Complaints about Service Procedure

As a publicly funded body and as an administrative tribunal, it is important for us to have a process in place to deal with complaints about our service from individuals who have dealings with our office. Our Memorandum of Understanding also requires us to formulate and communicate a complaints procedure, and we have done so.⁵

Receiving Inquiries and Requests

This section provides a snapshot of the inquiries and requests this office has received to date, concluding with a representative sample of cases for which advice, authorization, or a determination was sought. Not surprisingly for a new office, a number of inquiries came to us that were fully outside our jurisdiction in that they were unrelated to a provincial government organization or public servant. Of the approximately ninety inquiries received by our office, approximately fifteen were in this category and were redirected. In such instances, we endeavoured to identify an alternative source of assistance.

⁵ See Appendix 3.

Of the remaining seventy-five inquiries, we opened a file for almost thirty and undertook a full analysis of each. We addressed the remaining inquiries through initial analysis followed by advice as to how the matter might be pursued.

Conflict of Interest

The government has defined conflict of interest as any situation where a public servant's private interests may be in conflict with his or her public service responsibilities. The onus is on each public servant to disclose an actual or potential conflict to his or her ethics executive. The conflict of interest commissioner is responsible for making a determination on matters referred to the commissioner by deputy ministers, heads of public bodies, and public servants for whom the commissioner is the ethics executive. These individuals may also seek the commissioner's advice on conflict of interest matters, as may the director of the Public Appointments Secretariat or a minister, regarding an individual being considered for appointment to a public body. To date, we opened files on seven such matters, two of which were referrals from a deputy minister or agency head.

Political Activity

As mentioned, part-time appointees in prescribed tribunals, since the passage of the *PSOA* on August 20, 2007, became a category of public servants subject to special restrictions on political activity. The new rules require that these appointees seek authorization to participate in political activity that is otherwise not permitted.

On October 10, 2007, Ontario had a general election. Political activity is at its most intense in the run-up to an election, and we had a number of inquiries during that period. However, matters connected to participation in political activity continued to be brought to our attention after the election. In all, we have addressed sixteen related requests to date.

Case Summaries

The following are summaries of some of the conflict of interest and political activity cases addressed during the period covered by this annual report.

Case 1 - Conflict of Interest

The chair of a regulatory agency asked the commissioner to determine whether it would be appropriate for the chair to accept free tickets to two events hosted by a private sector organization.

In his capacity as the chair's ethics executive, the commissioner determined that accepting the free tickets would be prohibited under section 4(1) of Ontario Regulation 381/07 because the tickets had a relatively high face value, the agency regularly makes decisions that may affect the organization's business, and a reasonable person might conclude that the gift could influence the chair when performing his/her decision-making duties.

The commissioner directed the chair not to accept the free tickets. The commissioner also advised the chair that the *PSOA* would not prohibit the chair from attending the events if he/she paid for the tickets. The chair confirmed that he/she would not accept the free tickets, but would pay for them if he/she decided to attend the events.

Case 2 - Conflict of Interest

The chair of an operational service agency asked the commissioner to determine whether there was a conflict of interest between his/her roles as chair and as a municipal bylaw investigator under Part VI of the *Municipal Act*, 2001.

Considering section 8 of Ontario Regulation 381/07, and in light of the mandate of the agency, the commissioner determined that the chair's role as municipal bylaw investigator would generally not conflict with his/her role as chair. However, as a precaution, the commissioner directed the chair to recuse him/herself from any discussions or decisions on matters that may come before the agency relating to the specific municipality (or local governments within the municipality) for which the chair is acting as an investigator.

Case 3 - Conflict of Interest

In his/her role as ethics executive, the chair of an adjudicative agency asked the commissioner for advice about a conflict of interest matter concerning a member of the agency. Specifically, the member had advised the chair that he/she worked on a part-time basis with two outside organizations, and that he/she acted as a registered lobbyist for both organizations.

The commissioner advised the chair that, in his view, the *PSOA* would not prohibit the member from working with the first organization, provided he/she recused him/herself from any discussions at the organization involving the Ontario government. The commissioner also advised the chair of his view that section 8 of Ontario Regulation 381/07 would prohibit the member from being involved with the second organization, since there is a conflict of interest between the member's adjudicative role and the second organization's primary function, which is to make representations to the Ontario government on policy issues. The commissioner stated that this conflict could not be resolved by the member's recusal. Further, the commissioner advised the chair that he believed the *PSOA* would prohibit the member from acting as a lobbyist with either organization.

The commissioner stated that to resolve the conflict, it may be the case that the member should either resign from the second organization and from his position as lobbyist with both organizations, or resign as a member of the agency. The member later advised the commissioner that he/she chose to resign from the agency.

Case 4 - Conflict of Interest

The chair of an adjudicative agency asked the commissioner to determine a conflict of interest matter involving the chair and his/her spouse. Specifically, the chair stated that his/her spouse is an appointee of the agency. The chair also provided the commissioner with additional details about the limits and extent of the relationship between the chair and the spouse as an appointee.

In his capacity as the chair's ethics executive, under section 65 of the *PSOA*, the commissioner determined that, based on the information provided, he had no concerns about compliance with the rules regarding family members in section 7 of Ontario Regulation 381/07. The commissioner also advised that should any conflict of interest matters arise in the

future with respect to the spouse, the chair should not act as the spouse's ethics executive, as would normally be the case under the *PSOA*. Rather, the commissioner advised the chair that he/she should refer these matters to the commissioner under section 65(6) of the *PSOA*.

Case 5 - Conflict of Interest

A member of an operational service agency asked the commissioner to determine whether there was a conflict of interest between his/her role as member, and as a professor at a university.

Considering section 8 of Ontario Regulation 381/07, the commissioner determined that the member's role as professor would generally not conflict with his/her role as member of the agency. However, as a precaution, the commissioner directed the member not to use any materials prepared by the agency or the responsible ministry in course materials without permission, not to disclose confidential information regarding the agency or the ministry in the context of his/her teaching, and not to publicly criticize agency or ministry policy. The commissioner also directed the member to include a disclaimer in research papers stating that the views in the paper are those of the author and do not necessarily reflect those of the agency or the ministry.

Case 6 - Conflict of Interest

A member of an operational service agency asked the commissioner to determine whether a conflict of interest arose on the basis that his/her spouse is a municipal councillor, and the municipality owns a facility that could be subject to decision-making before the agency.

Considering section 6 of Ontario Regulation 381/07, the commissioner stated that any potential conflicts of interest could be resolved if the member recused him/herself from any decisions or discussions regarding the particular facility in question, and if the member advised the chair of the agency of the spouse's position.

Case 7 - Conflict of Interest

A minister asked the commissioner for advice about the proposed appointment of an individual to a particular agency.

The commissioner explained that his role under section 1(4) of Ontario Regulation 384/07 is to provide assistance to the minister in the minister's assessment of any potential or real conflicts of interest the proposed appointee may have, as described in the *PSOA* and its regulations.

The commissioner stated that the minister's assessment must take into account the individual's potential role within the agency, his/her past and present activities, and his/her financial and other interests, and must consider whether these activities and interests could call into question the integrity, impartiality, and/or independence of the agency. In particular, the commissioner directed the minister's attention to section 3 of Ontario Regulation 381/07, relating to individuals and family members benefiting from employment, and section 9 of that regulation, which prohibits individuals from participating in decision-making if those individuals could benefit from the decision.

Finally, the commissioner referred to the conflict of interest rules of another agency, which provided specific examples of how the *PSOA*'s principles of ethical conduct are applied in a context similar to that of the agency in question.

Later, the minister advised the commissioner that he had conducted the necessary assessment of the individual, and had decided to proceed with the appointment.

Case 8 - Political Activity

A part-time member of an adjudicative agency applied to the commissioner for authorization to engage in political activity that is not otherwise permitted under the *PSOA*. Specifically, as a specially restricted public servant under section 85(2)9 of the *PSOA*, the member sought to post a sign in front of his/her residence in support of a political party/candidate during a provincial election period.

The commissioner first stated that the purpose of the political activity rules in Part V of the *PSOA* is to balance the need to preserve the integrity and neutrality of the public service with individuals' right to engage in political activity.

Under section 92(5), based on the nature of the political activity in question, the scope of discretion exercised by the member at the agency, and the visibility of the member's position, the commissioner concluded that the member could not erect a sign as requested because it would conflict with the interests of the member's agency under section 92(4)(b) of the *PSOA*. Therefore, the commissioner declined to grant the requested authorization.

Case 9 - Political Activity

A part-time member of an adjudicative agency applied to the commissioner for authorization to engage in political activity that is not otherwise permitted under the *PSOA*. Specifically, as a specially restricted public servant under section 85(2)9 of the *PSOA*, the member sought authorization to continue as president of a federal riding association.

The commissioner first stated that the purpose of the political activity rules in Part V of the *PSOA* is to balance the need to preserve the integrity and neutrality of the public service with individuals' right to engage in political activity.

The commissioner made a preliminary finding that acting as president of a riding association is political activity that is not permitted under Part V of the *PSOA*. As an interim measure, the commissioner stated that the member should recuse him/herself from hearing any matters while the commissioner gathered more information about the member's agency and position with the riding association and determined whether an authorization was appropriate.

After receiving the commissioner's letter, the member advised the commissioner that he/she had decided to resign from the position of president of the riding association. Accordingly, the commissioner decided that it was not necessary to determine whether an authorization should be granted.

Case 10 - Political Activity

A part-time member of an adjudicative agency applied to the commissioner for authorization to engage in political activity that is not otherwise permitted under the *PSOA*. Specifically, as a specially restricted public servant under section 85(2)9 of the *PSOA*, the member sought to do the following during a provincial election period:

- canvass door-to-door for a specific candidate/party;

- distribute flyers door-to-door on behalf of the candidate/party; and
- attend polling stations as a scrutineer to determine who from the electoral district had not voted and relay this information to party headquarters so that the non-voting individuals could be contacted.

The commissioner first stated that the purpose of the political activity rules in Part V of the *PSOA* is to balance the need to preserve the integrity and neutrality of the public service with individuals' right to engage in political activity.

Under section 92(5), based on the nature of the political activity in question, the scope of discretion exercised by the member at the agency, and the visibility of the member's position, the commissioner concluded that the member's proposed activities would conflict with the interests of his/her agency under section 92(4)(b) of the *PSOA*.

Accordingly, the commissioner declined to grant the authorization requested by the member.

Case 11 - Political Activity

A part-time member of an adjudicative agency applied to the commissioner for authorization to engage in political activity that is not otherwise permitted under the *PSOA*. Specifically, as a specially restricted public servant under section 85(2)9 of the *PSOA*, the member sought authorization to, among other things, act as a member of the national executive of a federal political party, and as a campaign manager for a particular member of parliament.

The commissioner first stated that the purpose of the political activity rules in Part V of the *PSOA* is to balance the need to preserve the integrity and neutrality of the public service with individuals' right to engage in political activity.

The commissioner stated that the *PSOA* clearly permits specially restricted public servants to be a member of a political party (section 89(1)(c)). However, the commissioner also stated that the legislative permission to be a member of a political party does not grant the right to be involved in all activities available to members of the party.

The commissioner concluded that the member's proposed activities would conflict with the interests of his/her agency under section 92(4)(b) of the *PSOA*. The commissioner based his decision on the following factors as described in section 92(5) of the *PSOA*:

- the member's proposed political activities would put him/her at the heart of partisan politics and clearly would identify him/her not only as an active supporter of a particular political candidate/party, but also as a person responsible for the management of the party and as someone with an active role in the development and direction of the party
- the member has broad discretion in his/her position with the agency, and the public could reasonably perceive his/her discretionary decisions to be influenced by political considerations
- the member's position with the agency makes him/her visible to the public.

The commissioner further stated that the member's proposed activities are not time limited, or limited to a particular policy issue or political function, and that the proposed activities are of a high-profile nature. For these reasons, the commissioner concluded that neither restrictions

on the proposed political activity nor a leave of absence from the agency would be viable options for addressing the conflict concerns.

Accordingly, the commissioner declined to grant the authorization requested by the member.

Later, the member informed the commissioner that he/she had accepted a senior position with the party, not contemplated in the request for authorization, and as a result had decided to resign his/her position with the agency.

Case 12 - Political Activity

An ethics executive with an adjudicative agency asked the commissioner for general advice about political activity and the agency's politically restricted public servants. In particular, the ethics executive asked the commissioner for guidance in deciding whether a part-time member of the agency who wished to become a member of a local riding association would be required to apply to the commissioner for authorization under section 92 of the *PSOA*.

The commissioner advised that ethics executive that, in his view, membership in a riding association constitutes political activity under section 72 of the *PSOA*, and that whether or not undertaking the activities of a member of a riding association should be authorized under section 92 would have to be determined by the commissioner on a case-by-case basis.

Case 13 - Political Activity

A part-time member of an adjudicative agency applied to the commissioner for authorization to engage in political activity that is not otherwise permitted under the *PSOA*. Specifically, as a specially restricted public servant under section 85(2)9 of the *PSOA*, the member sought authorization to act as treasurer for a provincial riding association.

The commissioner first stated that the purpose of the political activity rules in Part V of the *PSOA* is to balance the need to preserve the integrity and neutrality of the public service with individuals' right to engage in political activity.

The commissioner stated that the *PSOA* clearly permits specially restricted public servants to be a member of a political party (section 89(1)(c)). However, the commissioner also stated that the legislative permission to be a member of a political party does not grant the right to be involved in all activities available to members of the party.

The commissioner concluded that the member's proposed activity would conflict with the interests of the member's agency under section 92(4)(b) of the *PSOA*, based on the following factors as described in section 92(5):

- the position of treasurer is part of the executive of the riding association, and this role would put him/her at the heart of partisan politics, and clearly would identify him/her as an active supporter of a particular political candidate/party
- the member has broad discretion in his/her position with the agency, and the public could reasonably perceive his/her discretionary decisions to be influenced by political considerations
- the member's position with the agency makes him/her visible to the public.

In addition, the commissioner considered the fact that the agency's proceedings take place throughout the province, including the geographic area of the riding association. The commissioner also noted that the agency's website identifies the member as being very actively involved in the community, including in boards and local service clubs, and that, as such, his/her political and other activities would be well known within the community.

Accordingly, the commissioner declined to grant the authorization requested by the member.

Case 14 - Political Activity

A part-time member of an adjudicative agency applied to the commissioner for authorization to engage in political activity that is not otherwise permitted under the *PSOA*. Specifically, as a specially restricted public servant under section 85(2)9 of the *PSOA*, the member sought authorization to publicly endorse and assist a particular federal candidate in an upcoming federal election.

The commissioner stated that the *PSOA* clearly permits specially restricted public servants to be a member of a political party (section 89(1)(c)). However, the commissioner also stated that the legislative permission to be a member of a political party does not grant the right to be involved in all activities available to members of the party.

The commissioner concluded that the member's proposed activities would conflict with the interests of his/her agency under section 92(4)(b) of the *PSOA*. The commissioner based his decision on the following factors as described in section 92(5) of the *PSOA*:

- the member's proposed political activities would put him/her at the heart of partisan politics and clearly would identify him/her as an active supporter of a particular political candidate;
- the member has broad discretion in his/her position with the agency, and the public could reasonably perceive his/her discretionary decisions to be influenced by political considerations; and
- the member's position with the agency makes him/her visible to the public.

The commissioner further stated that, in his view, the proposed political activity would publicly signal the member's political allegiance, which could affect the public's perception regarding his/her neutrality as a member of the agency.

Accordingly, the commissioner declined to grant the authorization requested by the member.

PRIORITIES FOR NEXT YEAR

We have identified a number of priorities for the next fiscal year:

Develop policies and procedures

Our office will develop written policies and procedures for our activities. With these documents, public servants will be able clearly understand the scope and limits of the conflict of interest commissioner's mandate, as well as the type of information the commissioner requires when called upon for advice or to make a decision.

Develop forms and guidelines

To complement the policies and procedures, we intend to develop forms and guidelines to assist public servants in collecting and presenting the information required when the commissioner is asked for advice or to make a decision.

Redesign website

Our website will be redesigned to better direct and facilitate inquiries and requests, accommodate approved rules of public bodies, and allow for posting bulletins and other information to assist public servants in understanding their obligations and the rules that govern them.

Initiate and strengthen partnerships

We will continue to work collaboratively with our Ontario government partners and will reach out to our federal and municipal counterparts. We will also establish links with organizations with mandates similar to ours, in other jurisdictions across Canada and elsewhere, in order to learn from their best practices and to share information of mutual benefit.

We expect to further develop and add to these early priorities as the role and functions of this office evolve.

Appendix 1: Names of Appointees

In accordance with the memorandum of understanding, the annual report is to include "the name of any appointees including when each was first appointed and when the current term of each appointment expires."

Appointee	Effective Date of Appointment	End of Term
Justice Sidney B. Linden	July 30, 2007	July 30, 2012

Appendix 2: Financial Summary

FINANCIAL INFORMATION FOR FISCAL YEAR 2007-08

Standard Account	2007-2008 Estimated Expenditures *	2007-2008 Actual Expenditures
Salaries and wages	\$349,000	\$340,056
Employee benefits	47,000	26,935
Transportation and communication	0	5,950
Services	365,000	347,927
Supplies and equipment	11,100	102,013
Subtotal:	<u>\$772,100</u>	<u>\$822,881</u>
Add: Year-end Adjustments	50,800	
TOTAL	<u>\$822,900</u>	<u>\$822,881</u>

* Note: The Office of Conflict of Interest Commissioner was established on August 20, 2007. In 2007-08 the funding for this office was managed from within the Human Resource Management and Corporate Policy Division, Ministry of Government and Consumer Services.

Appendix 3: Complaints about Service Procedure



COMPLAINTS ABOUT QUALITY OF SERVICE

Complaints about COIC Office Service

The Office of the Conflict of Interest Commissioner is committed to providing quality service to individuals. The following process has been developed to ensure that complaints are responded to in a timely, transparent and fair manner.

What types of complaints are covered by this policy?

This policy applies to all complaints from individuals contacting the Office. While the Commissioner's mandate is limited to the Ontario Public Service, members of the public and others may, nonetheless make inquiries or seek assistance. Complaints can relate to the Office's process for acknowledging, re-directing or responding to inquiries and matters brought to the attention of the Office or the Commissioner.

What is not covered by this policy?

This policy does not apply to dissatisfaction with advice, a determination or other decisions made by the Commissioner. If a complaint is made in any of these respects, the Office will advise the complainant of the process to be followed and avenues available to seek the Commissioner's reconsideration or to obtain other redress of the matter.

Complaint Procedure

The Office of the Conflict of Interest Commissioner will respond to all written complaints and make every effort to resolve them. In addition, the Office will make every effort to explain the response.

About Service

A complaint about the quality of service received should be made in writing and sent directly to the attention of the Executive Director of the Office.

About Staff Member

A complaint may be raised with the staff member directly, either orally or in writing. If the complainant is not satisfied with the staff member's response, the complaint

should be made in writing and sent directly to the attention of the Executive Director of the Office.

About the Executive Director

A complaint about the Executive Director should be made in writing and sent directly to the Commissioner.

About the Commissioner

A complaint about the Commissioner should be made in writing and sent directly to the Minister of Government and Consumer Services.

Service Commitments

Timeliness

All written complaints, about service and a staff member, as covered under this policy, will be acknowledged and/or responded to by the Executive Director within 5 working days after the complaint has been received by the Office. Where 5 days is not sufficient to respond, the complainant will be advised in the acknowledgement, as to how long it is anticipated a response will require.

All written complaints about the Executive Director will be acknowledged and/or responded to by the Commissioner within 10 working days after the complaint has been received by the Commissioner. Where 10 days is not sufficient to respond, the complainant will be advised in the acknowledgment, as to how long it is anticipated a response will require.

Confidentiality

All complaints will be kept strictly confidential. Disclosure will be limited to only what is required to review and address the complaint fully and fairly. For example, if a person is the subject of a complaint, the person must be advised in order to facilitate the review.

Reporting Back

The complainant, and the person who is the subject of the complaint, where applicable, will be advised in writing, of the response to or outcome of the complaint as soon as is reasonably possible.

Questions

Questions regarding this policy and the complaints process should be directed to the Executive Director, Office of the Conflict of Interest Commissioner. For general information, contact the Office at 416-325-1571 or www.coicommissioner@ontario.ca

Appendix 4: Letter to Public Bodies re Conflict of Interest Rules (November 19, 2007)

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Ontario

Office of the Conflict of
Interest Commissioner
Bureau du commissaire
aux conflits d'intérêts

November 19, 2007

Dear

I am writing to you regarding the application of the *Public Service of Ontario Act* to public bodies, and in particular, the conflict of interest rules for public bodies. As you are aware, the PSOA is the statute which defines and governs the Ontario public service. This legislation was recently proclaimed (replacing the *Public Service Act*) as part of the government's effort to modernize, streamline and strengthen accountabilities in the OPS. Among other things, the new Act provides for the establishment of a permanent Conflict of Interest Commissioner and I was appointed Commissioner.

Pursuant to the PSOA, Ontario Regulation 381/07 was enacted to establish conflict of interest rules for current and former public servants. These rules reflect a codification of common law principles and accepted standards of ethics for Ontario public servants. Furthermore, these conflict of interest rules establish clear standards and are broad enough to cover most circumstances. For your reference, the PSOA and Ont. Reg. 381/07 can be found on the Ontario Government's e-Laws website: www.e-laws.gov.on.ca.

Sections 58 and 59 of the PSOA deal with the rules for public bodies and the transition to the new legislation. The legislation states that a public body may submit proposed conflict of interest rules to me for approval. It further states that should a public body choose not to submit conflict of interest rules, or, if rules proposed by the public body are not approved, the conflict of interest rules set out in the regulation will serve as the rules for the public body.

The legislation recognizes that some public bodies had conflict of interest rules in place prior to the PSOA. In such cases, those rules will continue to apply until the earlier of August 20, 2008 (one year following proclamation of the new *Act*) or until rules submitted by the public body have been approved and posted on the Office of the Conflict of Interest Commissioner website. In the event that rules have not been approved and posted by this date, the rules set out in Ont. Reg. 381/07 will apply to the public body. Approved rules will be posted in both official languages.

The legislation requires that I ensure that any rules submitted by a public body are at least equivalent to the degree of ethical conduct established in the conflict of interest regulation, having regard for the powers, duties and functions of the agency. As the regulation will serve as the benchmark against which proposed rules are considered, I urge your agency to familiarize itself with this regulation.

I intend to meet with agency chairs early in the New Year regarding this and other conflict of interest provisions. However, in the meantime, as PSOA sections 58 and 59 apply to 183 Ontario government agencies, I would appreciate your advising me, *prior to the end of this calendar year*, whether your agency intends to submit rules for approval or to rely on Ontario Regulation 381/07. This notification will greatly assist my Office in planning for the implementation of this aspect of the PSOA. When considering which approach is best suited to your agency, please keep in mind that rules proposed by a public body must apply to all current and former agency employees as well as appointment positions within the agency.

I appreciate your early attention to this matter and I look forward to working with you in furthering the government's efforts to improve the impressive record of excellence in the public service.

Yours sincerely,

The Honourable Sidney B. Linden
Commissioner

cc.

Appendix 5: Memorandum to Prescribed Public Bodies re Political Activity Rules (January 14, 2008)

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Ontario

Office of the Conflict of
Interest Commissioner

Bureau du commissaire
aux conflits d'intérêts

MEMORANDUM

To: All Chairs and members of Tribunals prescribed in O. Reg. 377/07

From: The Honourable Sidney Linden, Conflict of Interest Commissioner

Date: Monday, January 14, 2008

Re: **Political Activity Rules**
- **Government Appointees of Adjudicative Tribunals**
Specially Restricted Category

The purpose of this memorandum is to provide information regarding political activity rules for *specially restricted* public servants. As you are aware, *specially restricted* public servants are defined under section 85(2) of the *Public Service of Ontario Act, 2006* (PSOA). They include, among other public servants, every government appointee who is a member of any of the tribunals prescribed by Regulation 377/07.

The PSOA

The PSOA was recently proclaimed (replacing the *Public Service Act*) as part of the government's effort to modernize, streamline and strengthen accountabilities in the Ontario Public Service (OPS). The PSOA establishes both an ethical and human resource management framework for the public service. This new framework is designed to help the OPS maintain its high standards of integrity while providing important safeguards and protections that public servants need to do their jobs. The PSOA and all related regulations can be found on the Ontario Government e-laws website: www.e-laws.gov.on.ca.

Among other things, the PSOA establishes a permanent Conflict of Interest Commissioner. I have been appointed the Conflict of Interest Commissioner. In this position, I have key responsibilities for certain conflict of interest issues and political activity matters under the PSOA. The PSOA also establishes 'ethics executives' and sets out responsibilities for my position, the ethics executives, and Chairs of public bodies.

Political Activity Rules under the PSOA

The former *Public Service Act* established political activity rules for full time government appointees to agencies, boards and commissions without regard to the type or function of the public body. Only full time government appointees had restricted political activity rights.

Part V of the PSOA establishes the political activity rules for public servants and government appointees. One of the significant changes under the PSOA is the inclusion of all government appointees to adjudicative tribunals, whether full or part time, in the *specially restricted* category of public servants. All appointees to adjudicative tribunals listed in Ontario Regulation 377/07 have now been placed in a *specially restricted* category of public servants who are subject to comprehensive political activity restrictions and have limited political activity rights.

The purpose of these provisions under the PSOA is to uphold the constitutional convention of political neutrality of the public service and to balance the need to preserve the integrity and neutrality of Ontario's adjudicative tribunals with an individual's right to engage in political activity.

Adjudicative tribunals are an important component of Ontario's administration of justice. The tribunals prescribed by regulation under the PSOA are tribunals which determine legal rights between individuals and the government and between the parties before the tribunal. Public confidence in Ontario's tribunals, in their integrity, impartiality, and independence is indispensable to the administration of justice.

One of the policy rationales for the change is to bring part time members to the same standard of conduct as full time members. All members on the prescribed adjudicative tribunals are quasi-judicial officers. The change in political activity rules brings the part time adjudicators to the same standard of conduct as all other quasi-judicial officers. The legislated political neutrality of adjudicators is intended to eliminate any concerns or allegations of bias or the reasonable apprehension of bias in tribunal decisions. The inclusion of all adjudicative tribunal members in the *specially restricted* category is intended to further public confidence in the administration of justice.

What is "political activity"?

Part V, section 72 of the PSOA, provides that a public servant engages in political activity when,

- a) the public servant does **anything** in support of or in opposition to a federal or provincial political party; [emphasis added]
- b) the public servant does **anything** in support of or in opposition to a candidate in a federal, provincial or municipal election; [emphasis added]
- c) the public servant is or seeks to become a candidate in a federal, provincial or municipal election; or

- d) the public servant comments publicly and outside the scope of the duties of his or her position on matters that are directly related to those duties and that are dealt with in the positions or policies of a federal or provincial political party or in the positions or policies publicly expressed by a candidate in a federal, provincial or municipal election.

The definition of 'political activity' in section 72 above captures a wide range of activity. Various academic articles, Law Reform Commission reports and court decisions describe political activity, (activities in support of or against a political party or candidate), as such actions as:

- publicly displaying a political party sign;
- wearing a political badge;
- involvement or attendance at riding associations;
- attendance at a political candidates' speech;
- attendance at a political fundraiser;
- soliciting funds;
- campaigning;
- attendance at a political rally or convention;
- volunteer work for a political party or candidate; and
- any public comment regarding a policy or platform of a political party or candidate.

The above descriptions are not exhaustive but rather an attempt to describe the broad range of conduct the term "political activity" may cover, and to help provide a better understanding of the Act and the aim of the PSOA.

Permitted political activity

Specially restricted appointees are prohibited from engaging in any political activity other than what is expressly permitted in the legislation. Section 89 of the PSOA provides that a *specially restricted* public servant may:

- a) vote in a provincial or federal election;
- b) be a member of a provincial or federal political party;
- c) contribute money to a federal or provincial party, or to a federal, provincial or municipal candidate; and
- d) attend an all-candidates' meeting.

It is important to note, that the legislative permission to be a member of a political party does not extend the right to public servants to exercise all party membership rights or to participate in all the activities of a political party or riding association.

Authorization for part time appointees to engage in political activity

Pursuant to section 92 of the PSOA, *specially restricted* part time appointees must seek authorization to engage in any political activity that is not expressly permitted under section 89. Part time appointees cannot engage in any political activity, other than the political activity expressly permitted under the Act, unless and until express written authorization is granted by me pursuant to section 92 of the PSOA. Applications for authorization to engage in political activity must:

- be made in writing;
- be made prior to engaging in any political activity;
- specify every political activity contemplated by the public servant; and
- include the specific time frame the public servant intends to participate in the activity described.

If any authorization is granted, it is only for the specific political activity and in the time frame as outlined in the written authorization. The legislation does not provide for or authorize broad waivers or exemptions from the political activity provisions and restrictions. Upon receiving the application, the PSOA states the Commissioner shall make any inquiries considered appropriate. All or some of the political activity may be authorized if I determine that the activities would not interfere in the performance of the public servant's duties or conflict with the interests of the public body.

In determining whether the activities would not interfere in the performance of the public servant's duties or conflict with the interests of the public body, subsection 92(5) of the PSOA states that the Commissioner is required to consider the following:

1. The nature of the political activity specified;
2. The scope of discretion exercised and if the exercise of the discretion could reasonably be perceived to be affected by political considerations;
3. The visibility of the position; and
4. Such other factors considered appropriate.

If authorization is granted, the Commissioner may impose any conditions and restrictions that are considered appropriate in the circumstances, including requiring the part time appointee to be on an unpaid leave of absence. Appointees are required to comply with any directions given in this regard.

Responsibilities of Ethics Executives

The PSOA also creates 'ethics executives' which have various responsibilities. In most cases, questions from government appointees regarding political activity should first be directed to the appropriate ethics executive. The ethics executives for public servants of a public body are listed in O. Reg. 375/07. The ethics executives for all government appointees is the Chair of the public body, although unlike the full time appointees whose application for authorization to engage in political activity must be made to their ethics executive, part time appointees' must make application to the Conflict of Interest Commissioner pursuant to section 92(3) of the Act. The ethics executive for the Chair of a public body is the Conflict of Interest Commissioner.

Specially restricted public servants are obligated to notify their ethics executive and, in the case of part time appointees, the Conflict of Interest Commissioner, if their political activity could conflict with the interests of the public body. If it is determined that the public servant has or is about to engage in political activity in contravention of the Act or a direction given under the Act, either the ethics executive or the Commissioner, as the case may be, can give any appropriate directions to address the matter. The ethics executive may also refer any matter brought to their attention to the Commissioner for determination.

Additional Responsibilities of the Conflict of Interest Commissioner

In addition to receiving applications for authorization to engage in specific political activity, the Commissioner is responsible for handling referrals from Chairs and ethics executives of public bodies. If the Commissioner determines that a government appointee has engaged in political activity in contravention of the Act, direction, or Regulation, the Minister responsible must be notified.

Directions given by an ethics executive or the Conflict of Interest Commissioner must be complied with. A government appointee, who engages in political activity in contravention of the Act, or a direction given, is subject to disciplinary measures, including suspension and removal.

Summary

It is recognized that the inclusion of part time tribunal members into the *specially restricted* category of public servants is a significant departure from the former political activity rules which governed appointees. Political activity which may have been previously permitted or not otherwise regulated is now expressly prohibited by the PSOA.

The PSOA came into force on August 20, 2007 and does not contain transition provisions. As a result, any government appointee to the adjudicative tribunals who engages or has engaged in any political activity, other than what is expressly permitted by the legislation or expressly authorized pursuant to an application made under section 92 of the PSOA, may be in a conflict of interest position.

In view of the new legislative landscape, part time appointees to the adjudicative tribunals who intend to engage in political activity that is not expressly permitted by the Act should contact the Office of the Conflict of Interest Commissioner in writing. Please find attached the information required in order to consider your application.



Information request for applications, section 92 PSOA

Please include the information set out below in your application for authorization to engage in prohibited political activity pursuant to section 92 of the PSOA. You will be contacted if the Commissioner requires any further information to consider your application.

Applicant Information

- name
- tribunal
- contact information
- municipality of residence
- start and end date of appointment

Tribunal Information

- nature/description of tribunal (type of hearings; legislation; etc)
- description of panel
- geographic location over which Tribunal has jurisdiction
- frequency and location of hearings

Proposed Political Activity

- level of government
- riding/ward (please indicate if any hearings anticipated in that riding/ward)
- nature of proposed political activity
- location of proposed activity
- amount of time anticipated
- extent of direct contact with public at large and/or tribunal stakeholders
- proposed start & end date of activity

Other information

- applicant's other employment and positions held, if any (please describe)
- ethics executive's awareness (i.e., tribunal chair) of request for authorization
- other pertinent information

